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Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

STUART W. ROSE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Supreme Court of Illinois denied leave to appeal from a decision of the Illinois Appellate Court, which had upheld a ruling that evidence ordered suppressed in a prior criminal proceeding due to an illegal search and seizure could nonetheless be used as a factor in aggravation, in a sentencing hearing on a subsequent related criminal charge.

The question presented for review is:

Whether, under the Illinois State and U.S. Constitutions, evidence seized in violation of constitutional provisions, once excluded from use in that "criminal prosecution," should also be excluded from use against this defendant in a subsequent sentencing hearing on similar charges?

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OPINION BELOW

On August 16, 2001, defendant was indicted and charged in this matter (No. 01 CF 2075) with: unlawful possession of a controlled substance with intent to deliver; intent to manufacture a controlled substance; and controlled substance trafficking. He had previously been the subject of a prior arrest on similar charges (No. 98 CF 2273), but, after a hearing, the court ordered all evidence obtained from that matter suppressed, finding it obtained via the result of an illegal search.

On February 2, 2006, the parties in this matter offered to the circuit court a "partial plea agreement." As recounted, the State would *nolle pros* the unlawful possession and trafficking counts, in return for defendant's blind plea of guilty on the intent to manufacture count, a Class X felony. The court accepted this agreement, and continued the matter for sentencing.

At the sentencing hearing on May 23, 2006, the court over defendant's objection allowed (and heard) evidence in aggravation concerning the circumstances of the defendant's prior arrest and charges, despite the fact that evidence had been previously ordered suppressed for a constitutional violation. As a result. and expressly in reliance on that suppressed evidence, the court sentenced defendant to 14 years' imprisonment.

On September 14, 2006, the circuit court denied defendant's motion to reconsider that sentence. (Appendix B.) On September 22, 2006, defendant filed his notice of appeal.

By written decision of August 13, 2008, the Appellate Court of Illinois, Second Judicial District, affirmed the decision and judgment of the circuit court. (Appendix A.) On November 26, 2008, the Illinois Supreme Court denied defendant's petition for leave to appeal. (Appendix C.)

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.C.A. Const. Amend. IV.

> The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit

> particularly describing the place to be searched and the persons or things to be seized.

ILCS Const. Art. 1, 6.

STATEMENT OF THE CASE

On August 16, 2001, defendant/appellant Stuart W. Rose was indicted and charged with: (1) unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(6.5)); (2) intent to manufacture a controlled substance (720 ILCS 570/401(a)(6.6)(B)); and (3) controlled substance trafficking (720 ILCS 570/401.1(a)).

During discovery, defendant requested that the State supply the names of confidential informants, to support his anticipated entrapment defense. The parties initially agreed that defendant would provide the court with a factual narrative of the people he was living with and befriended. The State in turn would provide the court with the informants' information. The court would then conduct an *in camera* inspection of the information from the State, before any turn over to the defendant. The court entered an order, accordingly.

The State later moved to reconsider, arguing defendant's request was a "fishing expedition." The circuit court denied the State's motion to reconsider, and when the State refused to comply, subsequently granted defendant's motion to dismiss the indictment.

The State appealed. The appellate court reversed and remanded, holding that defendant had offered only vague, speculative assertions which did not require a response as necessary to prepare his entrapment defense. *People v. Rose*, 342 Ill.App.3d 203 (2003).

Following remand, defendant offered further details to support his affirmative defense of entrapment. After an *in camera* inspection, the court granted defendant's motion to disclose in part, allowing defendant to use the informant's name only in the preparation of his case.

On February 2, 2006, the parties presented a "partial plea agreement" to the court. In exchange for defendant entering a blind plea of guilty to the intent to manufacture charge, the State would *nolle pros* the other charges. The court accepted the plea, and continued the matter for sentencing.

The sentencing hearing went forward on May 23, 2006. The State first asked the court to take judicial notice of the sentencing of a co-defendant, Jeremy Doucette (Doucette), who had, under a negotiated plea agreement, received a sentence of eight years for a Class X felony.

The State then called Officer Paul Nevara of the Lombard, Illinois, Police Department. Officer Nevara testified that on October 29, 1998, he was assigned to the Du Page Metropolitan Enforcement Group, a narcotics task force team working with the Glen Ellyn, Illinois, Police Department concerning a possible methamphetamine laboratory in an apartment defendant resided in at the time.

Defendant objected, arguing any evidence obtained from this prior matter had already been ordered suppressed, based on officers' failure to first obtain his proper consent to enter his apartment in violation of his Fourth Amendment rights. The State responded this evidence, even if deemed inadmissible for a criminal trial, would be admissible for sentencing. The court overruled defendant's continuing objection, and allowed testimony of the 1998 incident previously suppressed.

Officer Nevara then testified that on October 29, 1998, police searched defendant's apartment, finding products typically used in the manufacture of methamphetamine. Police also recovered five "baggies" containing a "gross weight" of 501.5 grams, and a "net weight" of 212.42 grams, of methamphetamine hydrochloride. According to Nevara, after waiving his *Miranda* rights, defendant said he had been in the methamphetamine business for five to six years.

Deputy Daniel Raysby, a police officer assigned to a narcotics unit, testified an informant named Mario purposely gave defendant Raysby's pager number, for the purpose of ultimately having defendant make contact with Raysby. As a result, on June 25, 2001, Officer Raysby, wearing a court-authorized eavesdrop device, met with defendant at a train station. The purpose of this meeting, Raysby stated, was to get to know each other, towards setting up a methamphetamine lab.

Raysby reported defendant described his prior case, and how police had violated his rights. According to Raysby also, defendant recounted he was taking a

different role with the manufacture this time, so as not to take any chances. During this meeting, defendant asked Raysby to obtain three different chemicals for him: ephedrine, crystal iodine, and red phosphoreus.

Raysby next met with defendant on June 28, 2001, again while wearing an eavesdrop device. Defendant discussed security for an apartment where methamphetamine was to be produced. Defendant related he was going to ship methamphetamine to California, for sale through Doucette.

During a July 3, 2001, meeting, defendant gave Raysby police reports from his prior charge, allegedly to show the "quality of the material" he could make. Defendant also described Doucette as his "partner," from out-of-state (California).

Police accordingly executed a search warrant on defendant's Lisle, Illinois, apartment on July 24, 2001. Certain items seized that day could be used in the manufacture of methamphetamine. Police also recovered a bag, belonging to Doucette, later determined to contain 13.9 grams of methamphetamine.

Defendant's father, Neil M. Rose (Mr. Rose), testified first in mitigation. Mr. Rose, an attorney, related that his son had a degree in electrical engineering from the University of Illinois, and a law degree from George Washington University. The parties stipulated defendant had passed the California bar exam. Defendant had been admitted to practice before the United States Patent and Trademark Office as a patent agent.

Following his arrest on this charge, defendant remained in custody until March 19, 2002. Upon his release, defendant resided with his parents until January 2003. During that time, defendant sought employment, took community college courses, and an on-line course in advanced mathematics at the University of Illinois. Mr. Rose never observed any indication that his son was using or manufacturing drugs during this time. Defendant then went on to the University of Illinois, in Urbana, Illinois, to complete work toward his Ph.D.

Defendant's girlfriend, Ayano Sakai, testified she first met defendant in the spring of 2004, when both were studying for exams at the University of Illinois. Sakai was in her second year of graduate work, toward a PhD in biophysics and biology. At the time of the hearing, she and defendant had resided together for a couple of years. During that time, Sakai had never observed defendant use illicit drugs, possess a weapon, or commit a violent act. He also never discussed the manufacture of drugs.

Tim Miller (Miller) founded, and was engineer and CEO for, Artisan Scientific Corporation. Miller met defendant in early 2003, when defendant began working with him in a research lab run by Dr. Anthony Crofts, a professor at the University of Illinois. Miller and defendant worked in the lab together an average of six days a week, 10-12 hours each day.

Miller later used defendant's expertise in electrical engineering to start his own lab and company. Miller lauded defendant's work ethic, as defendant ending up managing Miller's lab. Miller never saw defendant in

possession of or using illicit drugs, and never heard him talk about manufacturing illicit drugs. Miller also never observed defendant commit an act of violence, or be in possession of firearms.

Dr. Derrick Kolling met defendant in the spring of 2003, likewise while working in the same lab supervised by Dr. Crofts. They worked together about 70 hours per week, focusing on a protein to stop the aging process. Kolling saw defendant on an almost daily basis, and occasionally socialized with him outside the lab. During that time, Dr. Kolling never saw defendant use illicit drugs, or discuss illicit drugs, or the manufacture of such drugs. Kolling did become aware of defendant's history. Nothing Kolling heard during that sentencing hearing changed his opinion about being a character witness for defendant. Kolling had flown in from New Jersey for this court appearance.

Defendant then offered a letter from Dr. Crofts, professor of biochemistry and biophysics at the University of Illinois, which explained the importance of their work in the lab, and lauded defendant's significant contributions to combat the aging process.

Defendant made a statement to the court expressing remorse and embarrassment. He admitted being a past drug user, and wasting his life during that time. After his release, he tried to make meaningful contributions to society, and to maintain a healthy and production life. Indeed, up to and after sentencing, and during his imprisonment, defendant has authored or co-authored numerous significant technical articles.

See, S. Rose, A.R. Crofts, D. Kolling, *D1-arginine257 mutants (R257E, K and Q) of Chlamydomanas reinhartdtii have a lowered Qb redox potential: analyis of thermoluminescence and fluorescence measurements*, Springer Science+Business Media B.V. (August 2008), at 1-20; A.R. Crofts, S. Rose, *Marcus treatment of endergonic reactions: a commentary*, Biochimica et Biophysicia Acta (June 2007) (*www.sciencedirect.com*); A.R. Crofts, S. Rose, S. Lee, S.B. Crofts, J. Chenj, *Proton pumping in the bc1 complex: a new gating mechanism that prevents short circuits*, Biochimica et Biophysicia Acta (February 2006), at 1019-1034 (*www.sciencedirect.com*).

Defense counsel argued the court should consider the sentence of the co-defendant, Doucette, who had entered a guilty plea in return for an eight-year sentence. Counsel also argued Doucette was more culpable because Doucette had brought drugs from California. Moreover, while Doucette sat in jail, defendant pursued a Ph.D. and performed valuable research.

Defense counsel further argued defendant did not actually set up a methamphetamine lab in his Lisle apartment, but rather an individual named Mario purposely contacted defendant to put him in touch with an undercover police officer. They engaged in some "bravado" which the police acted on, knowing defendant had escaped the previous 1998 charges due to unlawful police conduct. Defense counsel argued there was no question that law enforcement officials wanted to "cultivate" defendant and, while defendant was a brilliant individual, he was "stupid enough" with his drug use to fall into this trap.

In sentencing, the circuit court specifically noted the State had presented "extensive evidence about [defendant's] prior experience with methamphetamine labs." The court accordingly sentenced defendant to 14 years' imprisonment.

On June 20, 2006, defendant moved to reconsider that sentence. On September 14, 2006, the circuit court denied defendant's motion to reconsider. (App. B) On September 22, 2006, defendant filed his notice of appeal.

The Appellate Court of Illinois, Second Judicial District, affirmed. (Appendix A; *People v. Rose*, 384 Ill.App.3d 937 (2008).)

Essentially, the Court first ruled that evidence suppressed in a prior case against defendant was not unreliable for purposes of sentencing him. The Appellate Court noted how a sentencing court is permitted to consider a broader range of evidence, including prior criminal conduct, so long as that evidence is relevant, reliable, and subject to cross-examination. In turn, the court described the exclusionary rule arising out of the Fourth Amendment and the Illinois Constitution as "not a personal constitutional right," and "not designed to prevent the use of suppressed evidence in all types of proceedings or against all people." (App. A, at 17a)

The Appellate Court then concluded that the exclusionary rule did not apply to the sentencing phase of criminal proceedings. The Court reasoned, in part:

> Though defendant decries the use of the suppressed evidence as exacerbating the violation of *his* constitutional rights, as discussed, the exclusionary rule is not designed as a remedy for the violation of an individual's constitutional rights, but rather is designed to deter future police conduct. [Citation omitted.] * * * Against the very minimal deterrent effect of excluding the evidence at sentencing we juxtapose society's broad interest in having criminals appropriately sentenced and the corresponding detrimental effect of excluding relevant and reliable evidence from the sentencing court's determination of the proper punishment. The test obviously weighs in the favor of allowing the sentencing court to consider the previously suppressed evidence, as the trial court did in this case.

(emphasis in original) (App. A, at 21a)

On November 26, 2008, the Illinois Supreme Court denied defendant's petition for leave to appeal. (App. C)

REASONS FOR GRANTING THE PETITION

This case presents an important question for resolution: whether evidence ordered suppressed in a prior case due to an illegal search may nevertheless be considered at a sentencing hearing on a subsequent, future charge. This Court has never directly considered the question of admissibility at sentencing of evidence suppressed under the Fourth Amendment. More pointedly, the facts in this case strongly suggest that law enforcement officials here utilized the knowledge gained from the prior illegal search and seizure to make direct contact with the same defendant again, in order to obtain evidence and ultimately prosecute him on related conduct in that future charge. Then, law enforcement officials were allowed to use that same prior illegally-obtained evidence and information not only to set up the subsequent prosecution, but also to enhance the sentence on the subsequent charge.

Such serious inroads on the exclusionary rule developed under the Fourth Amendment lead, in all practicality, to serious inroads upon the Fourth Amendment itself. This issue is thus of considerable importance to the administration of criminal justice.

REVIEW IS WARRANTED BECAUSE USE OF EVIDENCE EXCLUDED IN A PRIOR CHARGE, LATER USED TO IMPLICATE AND THEN SENTENCE THE SAME DEFENDANT FOR A SUBSEQUENT CHARGE, RAISES IMPORTANT FOURTH AMENDMENT CONCERNS.

Granted, the only limitation upon evidence to be admitted at the aggravation and mitigation phases of a sentencing hearing in Illinois is generally grounded in the dual prongs of relevance and reliability. *People v. Brisbon*, 106 Ill.2d 342, 364 (1995). Stated differently, evidence of prior criminal conduct can be admissible at a sentencing hearing in Illinois, even though not adjudicated, so long as it is relevant, reliable, and subject to cross-examination. *People v. Thomas*, 137 Ill.2d 500, 547, (1990).

On the other hand, the Fourth Amendment, as well as article I, section 6, of the 1970 Illinois Constitution, prohibit police from making warrantless, non-consensual entries into a suspect's home for the purpose of making a felony arrest or search, absent exigent circumstances. *Payton v. New York*, 445 U.S. 573, 585 (1980); see also, U.S. Const., Amend. IV; Ill.Const.1970, art. I, sec. 6. At the core of this protection is the recognition that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton*, 445 U.S. at 585.

Therefore, under the so-called exclusionary rule, "evidence obtained in violation of the Fourth Amendment

cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *U.S. v. Calandra*, 414 U.S. 338, 347 (1974); see also, *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); *Terry v. Ohio*, 392 U.S. 1, 29 (1968). This "exclusionary rule" under the Fourth Amendment has in the past been traditionally described as not only serving the purpose of "deterring lawless conduct" by law enforcement officers, but *also* of "closing the doors" to the courts to the use of any evidence unconstitutionally obtained. *Brown v. Illinois*, 422 U.S. 590, 599-600 (1975).

No less an authority than the learned Mr. Justice Holmes, writing for this Court, has declared that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall *not be used at all*." (emphasis added) *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385, 392 (1920).

Nevertheless, this Court has subsequently stated that the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights through its deterrent effect, *rather than* a personal constitutional right of the party aggrieved." (emphasis added) *Calandra*, 414 U.S. at 348. Thus in determining whether the exclusionary rule should be employed, a balancing test has now been developed, "to those areas where its remedial objectives are * * * most efficaciously served." *Calandra*, 414 U.S. at 348.

In this matter, the Appellate Court of Illinois ruled that the exclusionary rule is not a personal right, and on balance the admission of excluded or suppressed

evidence at sentencing was permissible. To that end, the Federal Circuits have basically sided with the view that the exclusionary rule is not applicable in a sentencing hearing. *United States v. Acosta*, 303 F.3d 78, 86 (1st Cir.2002); *United States v. Ryan*, 236 F.3d 1268, 1271-72 (10th Cir.2001); *United States v. Brimah*, 214 F.3d 854, 858 (7th Cir.2000); *United States v. Tauil-Hernandez*, 88 F.3d 576, 581 (8th Cir.1996); *United States v. Kim*, 25 F.3d 1426, 1435 (9th Cir.1994); *United States v. Montoya-Ortiz*, 7 F.3d 1171, 1181-82 (5th Cir.1993); United States v. Jenkins, 4 F.3d 1338, 1344-45 (6th Cir.1993); *United States v. Tejada*, 956 F.2d 1256, 1263 (2d Cir.1992); *United States v. Lynch*, 934 F.2d 1226, 1236-37 (11th Cir.1991); *United States v. McCrory*, 930 F.2d 63, 69 (D.C.Cir.1991); *United States v. Torres*, 926 F.2d 321, 325 (3rd Cir.1991).

Theses case have described that evidence illegally seized is not inherently unreliable (see, *e.g.*, *Brimah*, 214 F.3d at 858), and that "the deterrent effect of the exclusionary rule does not outweigh the detrimental effects of excluding reliable evidence on the court's ability to meet its goal of proper sentencing." *Acosta*, 303 F.3d at 85. These cases generally did not discuss, let alone fully consider, the traditional "second prong" of the exclusionary rule: the "closing [of] the doors" to the courts of any use of this evidence. See, *Brown*, 422 U.S. at 599-600. Too, these cases dealt with federal sentencing guidelines (see, 18 U.S.C. § 3661 (2000)), not a sentencing hearing under state law.

Respectfully, the exclusionary rule arising out of the Fourth Amendment is more than a remedy through some sort of nebulous "deterrent" effect on police officers.

Rather, the exclusionary rule should be viewed as uniquely "part and parcel of the Fourth Amendment's limitation upon (governmental) encroachment of individual privacy." *Mapp v. Ohio*, 367 U.S. at 651. Evidence illegally obtained should remain unusable against that defendant.

By "demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law." *Calandra*, 414 U.S. 366 (Brennan, J., dissenting), citing Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.Chi.L.Rev. 665, 756 (1970). To allow the use of unconstitutionally seized evidence at sentencing should be viewed as tantamount to taking "a big bite out of the exclusionary rule." *United States v. McCrory*, 930 F.2d 63, 72 (D.C. 1991) (Silberman, J., concurring in part). If the exclusionary rule is not applied in sentencing, we risk "the constitutional ban on unreasonable searches and seizures [becoming] a parchment barrier." *United States v. Jewel*, 947 F.2d 224, 240 (7th Cir. 1991) (Easterbrook, J., concurring). Such "[s]erious inroads on the exclusionary rule mean, as a practical matter, serious inroads on the fourth amendment." *Jewel*, 947 F.2d at 239 (Easterbrook, J., concurring).

Still, some courts have indicated that the exclusionary rule ***can*** apply at sentencing regardless, but ***only*** if there is evidence that police violated a defendant's fourth amendment rights with the purpose of obtaining a greater or enhanced sentence. See, *Acosta*, 303 F.3d at 85 (and cases cited therein).

This aspect should likewise be reviewed because, respectfully, this view unnecessarily injects law enforcement "intent" into what should be a constitution-based inquiry. The exclusionary rule should be a "prophylactic: it applies across the board in situations where the incentives for the police and the deterrence provided by the rule are such that exclusion is required and without reference to what motivated the particular search in issue." *McCrory*, 930 F.2d at 72 (Silberman, J., concurring).

Too, the Fourth Amendment establishes an objective standard. *Graham v. Connor*, 490 U.S. 386, 397 (1989); see also, *United States v. Leon*, 468 U.S. 897 (1984). It is hard to discern how ascribing law enforcement "intent," after-the-fact, to a ruling on whether the exclusionary rule applies fits the otherwise objective standard under the Fourth Amendment. The rule should apply uniformly, including to sentencing, to promulgate the important constitutional safeguards to be free from unreasonable searches and seizures in one's own home. Otherwise, it is "hard to see why [law officer] motive should matter on either prudential or doctrinal grounds. Is the seizure less offensive to the Constitution, or is deterrence less important, when the police drain their minds of the possibility that the seizure will contribute to a conviction?" *Jewel*, 947 F.2d at 238 (Easterbrook, J., concurring). Simply put, injecting this sort of inquiry into Fourth Amendment analysis emasculates the intended protection.

If however the exclusionary rule is deemed to apply at sentencing only where police violate fourth amendment rights in order to obtain an enhanced

sentence, then the particular circumstances at issue here should be scrutinized. Undoubtedly, once the evidence from the prior charge against defendant was suppressed, and the prior charges against the defendant dropped, law enforcement officials still targeted him for future prosecution. They introduced an informant, "Mario," who in turn got defendant to contact an undercover officer wearing a wiretapping device. Law enforcement officials used knowledge gleaned from information suppressed in a previous charge – due to their own lawbreaking activities – toward making sure defendant was charged again for similar conduct. Exacerbating matters, that same suppressed evidence was used at a later sentencing, to enhance defendant's possible sentence. Indeed, the circuit court in sentencing specifically stated it relied upon this formerly suppressed evidence in crafting the sentence given.

This should not be countenanced. Law enforcement officials acted illegally, and were found by a court to have done so. Fundamentally, their illegal taint from this evidence should not form the basis not only of seeking out the defendant for future charges, but also of making sure the subsequent sentencing obtained against him is greater than otherwise.

DEFENDANT RECEIVED A DISPROPORTIONATE SENTENCE TO HIS CO-DEFENDANT.

As an additional point for consideration, the "imposition of punishment is one of the most important and sensitive of judicial responsibilities." *People v. Godinez*, 91 Ill.2d 47, 55 (1982).

Knowing defendant had escaped the 1998 charge due to unlawful police conduct, law enforcement officials admittedly placed an informant, "Mario," into contact with defendant, so Mario could then put defendant into contact with the undercover police officer. Law enforcement officials knew defendant was predisposed toward committing an offense by his willingness to participate in the act, even before his exposure to government agents. See, *People v. Latones*, 268 Ill.App.3d 718, 644 N.E.2d 426 (1994). Law enforcement officials thus actively "cultivated" defendant, basically using an informant to entrap him toward committing the offenses charged.

The sentencing here wholly neglects the sentence given co-defendant Doucette, in comparison. Again, in return for a guilty plea, Doucette received an eight-year sentence. Doucette's culpability however is more egregious; he brought meth materials to Illinois from California, and he was to be the "salesman" taking purportedly manufactured meth from Illinois to California for sale. He had a significant prior criminal background in California. He did nothing to contribute to society, while defendant's research, papers and work

contributed invaluable insight toward fighting the aging process. Yet, defendant received a 14-year sentence, while Doucette was only sentenced to eight years.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that this Court accept this petition, and this matter, for further review.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT FILED AUGUST 13, 2008

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

No. 01--CF--2075

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

STUART W. ROSE,

Defendant-Appellant.

JUSTICE BOWMAN delivered the opinion of the court:

Pursuant to a partially negotiated plea agreement, defendant, Stuart W. Rose, pleaded guilty to intent to manufacture a controlled substance (720 ILCS 570/401(a)(6.6)(B) (West 2000)). In exchange, the State nol-prossed two other drug charges against him. The trial court sentenced defendant to 14 years' imprisonment. On appeal, defendant argues that at sentencing the trial court (1) improperly considered evidence that was suppressed in a prior case against him, and (2) failed to adequately consider mitigating factors. We affirm.

Appendix A

I. BACKGROUND

On August 16, 2001, defendant was charged with intent to manufacture a controlled substance (720 ILCS 570/401(a)(6.5)(B) (West 2000)); unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(6.5) (West 2000)); and controlled substance trafficking (720 ILCS 570/401.1(a) (West 2000)). During discovery, defendant sought to obtain the names of informants to support an entrapment defense. The State argued that the sole informant had only provided defendant with an undercover officer's pager number. The parties initially agreed that defendant would provide a list of people whom he was living with and had befriended. The State would then provide the trial court with the informant's information for an *in camera* inspection, and the trial court would determine whether disclosure was required based on an entrapment defense. However, the State later moved to reconsider, arguing that, because defendant was claiming that the informant could have been one of many people, he was on a "fishing expedition." The trial court denied the State's motion. After the State refused to provide the informant's information to the trial court, the trial court granted defendant's motion to dismiss the indictment. On appeal, this court held that defendant had not met his burden of showing that disclosure of the informant's identity was necessary to prepare his defense. *People v. Rose*, 342 Ill. App. 3d 203, 206-07 (2003). We reversed the trial court's ruling and remanded the case for further proceedings. *Rose*, 342 Ill. App. 3d at 207.

Appendix A

On remand, defendant supplied further details of how particular people induced him to commit the crimes with which he was charged, and he renewed his request for an *in camera* inspection of the informant's information. The trial court ordered an *in camera* inspection of the informant's file. Thereafter, it granted in part defendant's motion to disclose, allowing defendant to use the informant's name solely in the preparation of his case.

On February 2, 2006, the parties presented a partially negotiated plea agreement to the trial court. In exchange for defendant pleading guilty to intent to manufacture a controlled substance, the State would nol-pros the remaining charges. The trial court accepted the plea agreement and continued the matter for sentencing.

Defendant's sentencing hearing took place on May 23, 2006. The State asked that the trial court take judicial notice that the codefendant in this case, Jeremy Doucette, had entered a fully negotiated plea agreement under which he was sentenced to eight years' imprisonment. As part of his plea agreement, Doucette was obligated to testify truthfully against defendant.

The parties agreed to the admission of tapes of recorded conversations between defendant and the undercover officer. The State then called Officer Paul Nevara of the Lombard police department as a witness. Nevara testified that on October 29, 1998, he was assigned to the Du Page Metropolitan Enforcement

Group, a narcotics task force team. On that day, the team was working with the Glen Ellyn police department regarding a methamphetamine laboratory in defendant's apartment.

At this point in the testimony, the defense objected. Defense counsel pointed out that the evidence about the 1998 laboratory pertained to prior charges against defendant. He argued that the evidence was inadmissible because it had been suppressed due to the police officers' failure to obtain defendant's consent before entering his apartment, in violation of his fourth amendment rights. The State countered that, even if the evidence was inadmissible for a trial, it was admissible at a sentencing hearing. The trial court overruled defendant's continuing objection and allowed testimony regarding the 1998 incident into evidence.

[The following material is nonpublishable under Supreme Court Rule 23.]

Nevara testified that on October 29, 1998, the police searched defendant's apartment and found five bottle of ephedrine, distilled water, rubber tubes, coffee filters, an amber Pyrex dish, beakers, iodine, red phosphorous, gas masks, Red Devil Lye, acetone, denatured alcohol; "Naptha"; and muriatic acid. These products are typically used to manufacture methamphetamine. The police also found five baggies of methamphetamine. The product had a "gross weight" of 501.5 grams and a "net weight" of 212.42 grams of methamphetamine hydrochloride. After waiving his *Miranda* rights,

defendant eventually told Nevara that he had been in the methamphetamine business for about five or six years. Defendant said that he had a partner whom he was teaching to make methamphetamine.

The State's next witness, Deputy Daniel Raysby, provided the following testimony. He had been a police officer for eight years and had been assigned to the narcotics unit for the previous five or six years. A police informant gave defendant his pager number. He wore a court-authorized eavesdrop device when he met with defendant on June 25, 2001, at the Lisle train station. They had previously talked in an untaped meeting, and the purpose of the June 25 meeting was to get more comfortable with each other and determine what each person would supply to set up a methamphetamine lab. Defendant talked about his prior case and said that he felt his rights had been violated. He also said that his former partner had acted as a police informant and was "being dealt with appropriately." Defendant said that he had previously taken chances by having people coming and going from his apartment, and this time he wanted to have a different role in manufacturing the drug. Defendant wanted to ship the methamphetamine to California for sale so that there would be no connection to him. Defendant asked Raysby to get ephedrine, crystal iodine, and red phosphorous.

Raysby met with defendant again on June 28, 2001, while wearing an eavesdrop device. Defendant said that he would be more comfortable if someone with a gun stood at the door of the apartment as security while

methamphetamine was being produced. Defendant asked Raysby about getting guns and said that he knew people in Du Page County who wanted to buy guns from Raysby. They later agreed that Raysby, armed with a gun, would assume the role of security in the apartment.

At a July 3, 2001, meeting, defendant gave Raysby police reports and other documents from his previous court case to show Raysby the quality of the material that he was able to make.

On July 10, 2001, Raysby again met with defendant while wearing an eavesdrop device. Defendant said that they were embarking on an endeavor that was a class X felony with penalties of 25 or 30 years' imprisonment. He said that he trusted Raysby and if Raysby did not trust someone who was with defendant, like the woman living with him, he could kill her.

Defendant and Raysby ultimately agreed that Raysby was to provide the ephedrine, red phosphorous, and iodine to make methamphetamine. Raysby had told defendant that he had access to these chemicals but also told defendant that he could get them himself. In exchange for the chemicals, defendant was to pay Raysby $500 cash and give him one ounce of methamphetamine. After the manufacturing process was complete, defendant was to give Raysby one or two ounces of the finished product. Defendant had described Jeremy Doucette as his partner and said that Doucette would travel from California and bring methamphetamine and materials to make methamphetamine.

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On July 24, 2001, defendant and Raysby were going to complete the deal. Raysby picked up defendant and Doucette. Defendant gave Raysby a small sample of methamphetamine. After Raysby told defendant that he did not think that it was enough, defendant went back to his apartment and brought down some more. Defendant never gave Raysby $500, and Raysby did not recall asking for the money. Raysby gave defendant ephedrine and defendant and Doucette passed it back and forth in Raysby's car.

When the police searched defendant's apartment later on July 24 pursuant to a warrant, they found two gallon jugs of acetone, a one gallon jug of denatured alcohol, two containers of charcoal, muriatic acid, tubing, plastic PVC, and glass corning ware. All of these items could be used to make methamphetamine. On top of a black leather bag, the police found a bag of what was later determined to be 13.9 grams of methamphetamine. Raysby believed that the bag belonged to Doucette.

Neil M. Rose (Mr. Rose), defendant's father, testified in mitigation as follows. He and his wife had been married for 58 years, and he was a patent lawyer. Defendant had a degree in electrical engineering from the University of Illinois and a law degree from George Washington University.[1] Defendant was admitted to practice before the United States patent and trademark

1. The parties stipulated that defendant had passed the California bar exam, though they were unaware of the status of his California attorney license.

office as a patent agent. Defendant was in custody from August 16, 2001, to March 19, 2002. He was released in March 2002 and lived with his parents until January 2003. During that time, he was looking for a job, taking community college courses, and taking an on-line course in advanced mathematics through the University of Illinois. Mr. Rose never saw any indication that defendant was using drugs during this time. He had also never seen defendant possess a gun or act violently; defendant was a very passive person. Mr. Rose was aware that defendant had been arrested in the late 1990s in California for possession of a controlled substance.

Defendant's girlfriend, Ayano Sakai[2], testified that she was in the second year of graduate work for a Ph. D. degree in biophysics and biology at the University of Illinois. She met defendant in the spring of 2004 when they were studying together for exams. At the time of the hearing, Sakai and defendant had been living together for a couple of years. Sakai had never seen him use illicit drugs, discuss manufacturing drugs, possess a weapon, or act violently.

Tim Miller testified that he was the lead engineer and CEO for Artisan Scientific Corporation, a company he founded. Miller met defendant in 2003, when defendant began working at the lab where Miller was working. The lab was supervised by a professor, Dr. Anthony Crofts. Miller and defendant worked together

2. The record spells the witness's last name as "Skaki," but according to defendant, the correct spelling is "Sakai."

about six days a week for 10 to 12 hours per day. Because defendant had a background in electrical engineering, Miller was able to teach him to use the custom instrumentation he had built for the lab, which in turn was a catalyst for Miller to leave the lab and start his own company. Defendant had a strong work ethic and ended up managing the lab. Miller never saw defendant possessing or using any illegal drugs or firearms. He had also never seen defendant act violently. Miller had learned of defendant's background while he was working at the lab because defendant had provided subtle hints and clues. However, defendant seemed very embarrassed about it and Miller never asked him for details.

Derrick Kolling testified that he worked with defendant at the lab from the spring of 2003 until about February 2005. Kolling saw defendant on an almost daily basis, and they worked in the lab about 70 hours per week. The lab's work focused on understanding the mechanism of a protein to help stop aging. Defendant was researching the issue from a computational aspect, applying quantitative mechanics. Kolling had never seen defendant behave violently; defendant seemed like a passive person. Kolling had also never seen defendant use illegal drugs or discuss manufacturing them. Defendant had told Kolling that he had some "run ins" with drugs in the past, but Kolling did not ask defendant any questions about it. Kolling had learned many more details about defendant's criminal background at the sentencing hearing, but it did not change his opinion regarding appearing as a character witness for

defendant. Kolling was currently living in New Jersey and had flown in for the court appearance.

Defendant offered into evidence a letter from Dr. Crofts, who taught biochemistry and biophysics at the University of Illinois. Dr. Crofts lauded defendant's contributions to the lab and stated that he had the highest regard for defendant as a scientist and colleague, and as an individual.

Defendant made a statement to the court acknowledging that he had acted wrongly in the past and expressing remorse. He had made a voluntary choice to do drugs and his actions were done with the intent of getting drugs. Defendant was now a different person and felt like he had wasted part of life. Since the time of his release, he was trying to make his life healthy and productive and meaningly contribute to the world.

That State argued that despite many previous chances to change his life, defendant had a pattern of criminal conduct. The State noted that defendant was arrested in California in 1995 for drug possession and had been placed in a diversion program; in September 1996 the diversion program was revoked and defendant was sentenced to non-reporting probation; while defendant was on probation, he set up a methamphetamine lab in Illinois (in 1998); the evidence against defendant was suppressed in that case; and defendant then, in the instant case, intended to set up a second methamphetamine lab. The State argued that although defendant had been working on a Ph. D. since

his release, he was already a licensed attorney when he was setting up methamphetamine labs. The State further argued that the eavesdrop tapes, where defendant talked about wanting someone with a gun at the door and suggested that Raysby could kill potential witnesses if necessary, was reflective of defendant's character. The State recommended a sentence of 20 years' imprisonment.

The defense asked the court to consider the sentence of co-defendant Doucette, who had pleaded guilty in exchange for an eight-year sentence. Defendant counsel argued that Doucette was more culpable than defendant because Doucette had brought drugs from California. He further argued that defendant had not actually set up a methamphetamine lab; that someone defendant knew had purposefully put him in contact with Raysby; that defendant and Raysby had engaged in "bravado and bragging"; and that the police wanted to "cultivate" defendant because he had escaped previous charges. Defense counsel argued that there was a lot of evidence presented about defendant's attitude showing that he had reached the abyss of his elicit drug involvement and would not reoffend. Defense counsel pointed out that while this case was pending, defendant sought to further his education by obtaining a Ph. D. and had been spending about 70 hours per week working on significant research that could benefit humanity. The defense requested that defendant be sentenced to six years' imprisonment.

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The trial court stated as follows. It had considered the evidence in aggravation and mitigation. It had listened carefully to the testimony of defendant's father, girlfriend, and friends, all of whom seemed like very nice people. It appreciated and had given weight to the love, care, and commitment Mr. Rose and Sakai had for defendant. However, it was ultimately defendant who was being sentenced, and he bore the responsibility for putting everyone in their current situation. The court had also listened to the testimony about the work defendant had done and had read the letter from his advisor. There was no doubt that defendant was an intelligent, articulate, and gifted person. Still, for most of defendant's life he had made very few positive contributions. When the instant crime occurred, defendant was about 37 years old, not a young man, and he had prior experience with methamphetamine labs. There was careful planning regarding setting up the lab, and defendant did not ultimately set one up only because the partner that he picked was an undercover officer. Defendant considered security and how he was going to distance himself from the product's sale to avoid getting in trouble. Defendant also discussed eliminating or harming people who could be dangerous to the enterprise.

[The preceding material is nonpublishable under Supreme Court Rule 23.]

Based on the factors in aggravation and mitigation, the trial court sentenced defendant to 14 years' imprisonment. The trial court stated that it would have

given defendant a greater sentence if not for the mitigating factors and defendant's own statement. The trial court subsequently denied defendant's motion to reconsider, and defendant timely appealed.

II. ANALYSIS

A. Consideration of Suppressed Evidence

Defendant first argues that at sentencing the trial court improperly considered in aggravation evidence that had been suppressed in a prior case against him. Defendant argues that the trial court's allowance of this evidence was improper (1) based on collateral estoppel, (2) based on the fourth amendment exclusionary rule, and (3) because the evidence was otherwise unreliable. We examine each of these contentions in turn.

Collateral estoppel, a component of double jeopardy, provides that, where there is a valid, final judgment determining an issue of ultimate fact, the same parties cannot litigate the same issue in a future case. *People v. Slywka*, 365 Ill. App. 3d 34, 41 (2006). Collateral estoppel applies where: (1) the issue decided in the prior suit is identical to the one presented in the current suit; (2) the prior suit contained a final judgment on the merits; and (3) the party against whom estoppel is asserted was a party to or was in privity with a party to the prior suit. *Slywka*, 365 Ill. App. 3d at 41. The applicability of collateral estoppel is a question of law, which we review *de novo*. *People v. Powell*, 349 Ill. App. 3d 906, 909 (2004).

Collateral estoppel is inapplicable here because the first requirement has not been met, in that the ultimate issues of fact in the two cases are not identical. In defendant's 1998 case, the grant of the motion to suppress was based on a determination that defendant's fourth amendment rights had been violated by the police officers' nonconsensual search of his apartment; the ultimate issue of whether defendant was guilty of manufacturing methamphetamine was therefore not reached. In the instant case, testimony regarding the 1998 methamphetamine lab was provided as evidence of defendant's prior crimes. As the issues adjudicated in the two cases are not identical, collateral estoppel does not apply. *Cf. People v. Fulton*, 68 Ill. App. 3d 915, 924-25 (1979) (although in civil forfeiture proceeding the State failed to present sufficient evidence that the defendant's car had been used to commit an offense, the ultimate fact of whether the defendant participated in the crime was not litigated, and collateral estoppel did not bar the State from subsequently attempting to prove the defendant guilty of various crimes based on an accountability theory).

Defendant next argues that the trial court erred in considering the suppressed evidence because "important constitutional considerations protecting against unreasonable searches and seizures outweigh the procedural rules governing broader admissibility of evidence during a sentencing hearing." Defendant argues that, by allowing such evidence at the sentencing hearing, the "unconstitutional impairment of [his] rights [was] exacerbated." Whether previously suppressed

evidence is admissible in a sentencing hearing presents a question of law, which we review *de novo*. See *People v. Daniels*, 187 Ill. 2d 301, 307 (1999) (questions of law reviewed *de novo*).

We begin our analysis of this issue by considering the types of evidence that are generally admissible in a sentencing hearing. It is well settled that the evidentiary standards used in sentencing are much less rigid than those used in the guilt-innocence phase of trial. *People v. Jackson*, 149 Ill. 2d 540, 547 (1992). At sentencing, the defendant's guilt has already been settled, and the sentencing judge is charged with the task of determining the type and extent of punishment, within certain statutory and constitutional limits. *Jackson*, 149 Ill. 2d at 548. "'Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.'" *People v. Adkins*, 41 Ill. 2d 297, 300 (1968), quoting *Williams v. New York*, 337 U.S. 241, 247, 93 L. Ed. 1337, 1342, 69 S. Ct. 1079, 1083 (1949). The trial court may conduct a broad search into a defendant's "'moral character, habits, social environment, abnormal tendencies, age, natural inclination or aversion to commit crime, and stimuli motivating his conduct, in addition to his family life, occupation, and criminal record.'" *People v. Harris*, 375 Ill. App. 3d 398, 408-09 (2007), quoting *People v. Moore*, 250 Ill. App. 3d 906, 919 (1993). The source and type of information that the sentencing court may consider is virtually without bounds. *People v. La Pointe*, 88 Ill. 2d 482, 496 (1981). For evidence to be admissible in a

sentencing hearing, it is required only to be reliable and relevant, a determination that is within the trial court's discretion. *Harris,* 375 Ill. App. 3d at 409.

In addition to considering a defendant's previous convictions, a sentencing court routinely considers crimes of which the defendant has not been convicted, including crimes for which the defendant has not been prosecuted. *Jackson,* 149 Ill. 2d at 548. A sentencing court may even consider evidence of crimes of which the defendant has been acquitted. *People v. Deleon,* 227 Ill. 2d 322, 340 (2008). This is so because a finding of not guilty is not a conclusive finding that the defendant did not commit the crime, but rather means that the State was unable to offer proof beyond a reasonable doubt that he did. Thus, the underlying facts of the previous crime may be considered during a sentencing hearing, where the burden of proof is lower. *Jackson,* 149 Ill. 2d at 550. The evidence of prior criminal conduct need be only relevant, reliable, and subject to cross-examination. *People v. Thomas,* 137 Ill. 2d 500, 547 (1990).

We now discuss defendant's rights regarding the suppressed evidence. The judicially created exclusionary rule generally serves to prevent evidence obtained in violation of the fourth amendment from being used in a criminal proceeding against the individual whose constitutional rights were violated. *Illinois v. Krull,* 480 U.S. 340, 347, 94 L. Ed. 2d 364, 373, 107 S. Ct. 1160, 1165 (1987). The central purpose of the exclusionary rule is to deter the police from acting unlawfully in the future, thereby effectuating the fourth amendment

guarantee against unreasonable searches and seizures. *Krull*, 480 U.S. at 347, 94 L. Ed. 2d at 373, 107 S. Ct. at 1165. The exclusionary rule is not a personal constitutional right of the aggrieved party, and its application is not intended or able to act as a remedy for the invasion of the party's rights that has already taken place. *Krull*, 480 U.S. at 347, 94 L. Ed. 2d at 373, 107 S. Ct. at 1165-66. The exclusionary rule is not designed to prevent the use of suppressed evidence in all types of proceedings or against all people. *People v. Dowery*, 62 Ill. 2d 200, 204 (1975). "[I]n determining whether the 'exclusionary rule' should be extended to certain proceedings a balancing test has been utilized to limit application of the rule 'to those areas where its remedial objectives are thought most efficaciously served.'" *Dowery*, 62 Ill. 2d at 204, quoting *United States v. Calandra*, 414 U.S. 338, 348, 38 L. Ed. 2d 561, 571, 94 S. Ct. 613, 620 (1974).

Our research has not revealed any Illinois case addressing the specific question of whether evidence suppressed on fourth amendment grounds in a prior case nonetheless may be considered at a sentencing hearing on a future charge. One case, *People v. Evans*, 125 Ill. 2d 50 (1988), discusses a sentencing court's consideration of previously suppressed evidence, but that case is distinguishable. In *Evans*, the defendant argued on appeal that the sentencing court erred in considering the testimony of an alleged prior rape victim, because during the defendant's trial for that offense the trial court granted his motion to suppress the victim's identification of him. *Evans*, 125 Ill. 2d at 90. The

defendant claimed that this prior suppression made the evidence unreliable at sentencing. *Evans,* 125 Ill. 2d at 91. Our supreme court held that the defendant's argument was without merit because the defendant failed to inform the sentencing court that the identification had been suppressed and because the victim's testimony was cumulative of the large amount of evidence in aggravation. *Evans,* 125 Ill. 2d at 91-92. The instant case, unlike *Evans,* involves evidence suppressed under the fourth amendment, so the mere fact that the evidence was suppressed does not equate to a finding that it was unreliable. Moreover, defendant preserved his argument in the trial court, and the introduction of the suppressed evidence would not amount to harmless error here.

While there is no Illinois law directly on point, we note that all but one of the federal appellate courts have resolved the issue at hand, and they have all concluded that the exclusionary rule generally does not apply to sentencing hearings. *United States v. Acosta,* 303 F.3d 78, 86 (1st Cir. 2002); *United States v. Ryan,* 236 F.3d 1268, 1271-72 (10th Cir. 2001); *United States v. Brimah,* 214 F.3d 854, 858 (7th Cir. 2000); *United States v. Tauil-Hernandez,* 88 F.3d 576, 581 (8th Cir. 1996); *United States v. Kim,* 25 F.3d 1426, 1435 (9th Cir. 1994); *United States v. Montoya-Ortiz,* 7 F.3d 1171, 1181-82 (5th Cir. 1993); *United States v. Jenkins,* 4 F.3d 1338, 1344-45 (6th Cir. 1993); *United States v. Tejada,* 956 F.2d 1256, 1263 (2d Cir. 1992); *United States v. Lynch,* 934 F.2d 1226, 1236-37 (11th Cir. 1991); *United States v. McCrory,* 930 F.2d 63, 69 (D.C. Cir. 1991); *United States v. Torres,*

926 F.2d 321, 325 (3rd Cir. 1991); see also *United States v. Nichols*, 438 F.3d 437, 441 (4th Cir. 2006) (citing *Acosta* and cases cited therein with approval). Though we are not required to follow decisions of federal courts other than the United States Supreme Court (*People v. Calvert*, 326 Ill. App. 3d 414, 424 (2001)), we may use such decisions as guidance (*People v. Criss*, 307 Ill. App. 3d 888, 900 (1999)). The aforementioned federal appellate courts have noted that a sentencing court may conduct a very broad inquiry into the defendant's background, character, and conduct in order to have the largest range of information available to determine the appropriate punishment. *Acosta*, 303 F.3d at 85-86. They have recognized that evidence that has been illegally seized is not inherently unreliable (see, *e.g.*, *Brimah*, 214 F.3d at 858) and concluded that "the deterrent effect of the exclusionary rule does not outweigh the detrimental effects of excluding reliable evidence on the court's ability to meet its goal of proper sentencing." *Acosta*, 303 F.3d at 85. Still, some of the federal courts have indicated that the exclusionary rule will apply at sentencing if there is evidence that the police violated the defendant's fourth amendment rights with the purpose of obtaining a greater sentence. See *Acosta*, 303 F.3d at 85 (cases cited therein).

Although Illinois has not yet had an opportunity to pass judgment on this issue, our supreme court has considered the related question of whether evidence suppressed on fourth amendment grounds in a criminal proceeding could nonetheless be used to revoke probation. In *Dowery*, the supreme court stated that,

"[w]hile a defendant is entitled to due process of law at probation revocation proceedings, significant dissimilarities exist between such proceedings and a criminal trial." *Dowery*, 62 Ill. 2d at 204. The court noted that the vast majority of cases from other jurisdictions examining the same issue had held that the exclusionary rule did not apply to probation revocation proceedings, because the deterrent effect of extending the rule to such proceedings would be minimal and the rule would interfere with the probation system's ability to gauge a defendant's rehabilitative effort. *Dowery*, 62 Ill. 2d at 204-05. The *Dowery* court reached the same result, reasoning that society's interest must be sufficiently considered during a probation revocation hearing and that, "[m]erely because there may exist a technical deficiency in police conduct, a trial court should not be forced to release a defendant and return him to a probationary status where there is patent evidence of a serious probation violation." *Dowery*, 62 Ill. 2d at 206.

In *People v. Brown*, 171 Ill. App. 3d 500 (1988), the appellate court considered the more specific question of whether the exclusionary rule should be applied to the sentencing phase of a probation revocation proceeding. Relying on *Dowery*, the appellate court held that the exclusionary rule did not apply and that the trial court could consider the suppressed evidence. *Brown*, 171 Ill. App. 3d at 503-04. The special concurrence, citing case law that a sentencing judge may conduct a very broad inquiry into a defendant's background, reasoned that the exclusionary rule does not apply to sentencing hearings. *Brown*, 171 Ill. App. 3d at 504-05 (McCullough, J., specially concurring).

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Considering the reasoning in *Dowery* and *Brown*, as well as the persuasive authority of the federal appellate decisions, we likewise conclude that the exclusionary rule does not apply to the sentencing phase of criminal proceedings. Though defendant decries the use of the suppressed evidence as exacerbating the violation of *his* constitutional rights, as discussed the exclusionary rule is not designed as a remedy for the violation of an individual's constitutional rights, but rather is designed to deter future police misconduct. *Krull*, 480 U.S. at 347, 94 L. Ed. 2d at 373, 107 S. Ct. at 1165-66. Thus, in determining whether the exclusionary rule applies, we conduct a balancing test weighing the potential deterrent effect of applying the rule at sentencing against the goal of having the sentencing judge consider all available relevant and reliable information in fashioning the most appropriate sentence. See *Brimah*, 214 F.3d at 857-58. We agree with the Seventh Circuit that "the application of the exclusionary rule to the government's case-in-chief * * * provides strong incentives for law enforcement officials to follow proper procedure in order to build as strong a case as possible against the defendant during the conviction phase of trial" (*Brimah*, 214 F.3d at 859), and we conclude that in a case such as the instant one, where the suppressed information is considered in an unrelated case brought years later, any increased deterrent effect of excluding the evidence is almost nonexistent. Though the federal courts have recognized the arguable risk that police could intentionally violate a defendant's fourth amendment rights in order to increase his sentence, we are in accordance with their

conclusion that it is doubtful "that there are many police officers who would risk the fruits of prior legitimate law enforcement activities in so cynical a fashion." *Tauil-Hernandez*, 88 F.3d at 581. Moreover, in this case there can be no colorable claim that the police violated defendant's fourth amendment rights for the purpose of enhancing an unrelated sentence years later. Against the very minimal deterrent effect of excluding the evidence at sentencing we juxtapose society's broad interest in having criminals appropriately sentenced and the corresponding detrimental effect of excluding relevant and reliable evidence from the sentencing court's determination of the proper punishment. The test obviously weighs in favor of allowing the sentencing court to consider the previously suppressed evidence, as the trial court did in this case.

Defendant notes that our supreme court has stated that the exclusionary rule applies to a "criminal prosecution" (*People v. Mayo*, 19 Ill. 2d 136, 139 (1960)), and he argues that sentencing is part of a criminal prosecution. However, although the exclusionary rule "usually" prevents evidence suppressed under the fourth amendment from being used in a criminal proceeding against the person whose constitutional rights were violated (*Krull*, 480 U.S. at 347, 94 L. Ed. 2d at 373, 107 S. Ct. at 1165), our supreme court has recognized that, "'"[d]espite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons."'" *Dowery*, 62 Ill. 2d at 204, quoting *Brown v. Illinois*, 422

U.S. 590, 600, 45 L. Ed. 2d 416, 425, 95 S. Ct. 2254, 2260 (1975).

Defendant further argues that *Dowery* and *Brown* are distinguishable because those cases involved probation revocation proceedings, which are civil. Defendant maintains that *Dowery* expressly recognized that there are significant differences between a probation revocation proceeding and a "criminal trial proceeding." In fact, *Dowery* noted significant differences between a probation revocation proceeding and a "criminal trial." *Dowery,* 62 Ill. 2d at 204. This case, of course, involves a criminal sentencing rather than a criminal trial, and, as discussed, the types of evidence that a trial court may consider vary greatly between the trial and sentencing phases of a criminal proceeding. In any event, regardless of the type of proceeding, the test for applying the exclusionary rule requires weighing the likelihood of deterring future police misconduct "against the costs of withholding reliable information from the truth-seeking process." *Krull,* 480 U.S. at 347, 94 L. Ed. 2d at 373, 480 S. Ct. at 1166. We have concluded that this test weighs against applying the exclusionary rule in criminal sentencing proceedings.

In his final argument on the issue of the suppressed evidence, defendant asserts that the trial court abused its discretion in considering this evidence, because it was otherwise unreliable. The suppressed evidence consisted of items seized from defendant's apartment, namely methamphetamine and purported materials to

manufacture the drug. Defendant argues that the evidence was tainted and unreliable because it was obtained through a constitutional violation. However, as we previously stated, evidence that has been illegally seized is not inherently unreliable. *Brimah*, 214 F.3d at 858. Defendant further argues that the evidence was unreliable because the State did not introduce any evidence to prove that he used the materials or made the methamphetamine. We reiterate that at sentencing the State is not required to prove beyond a reasonable doubt that the defendant was guilty of any previous crimes for which evidence is submitted, and the sentencing court may also consider crimes of which the defendant was acquitted. *Jackson*, 149 Ill. 2d at 549-50. A sentencing court may go so far as to consider hearsay evidence of uncharged or unconvicted crimes as long as the evidence is relevant and reliable, with the hearsay nature of the evidence going toward its weight rather than its admissibility. *People v. Bilski*, 333 Ill. App. 3d 808, 818 (2002). Here, Officer Nevara testified regarding the materials that he and other officers found in defendant's apartment, and Nevara was subject to cross-examination by the defense. The trial court clearly did not abuse its discretion by considering the evidence relevant and reliable.

Appendix A

B. Length of Sentence

The material in this section is nonpublishable under Supreme Court Rule 23.

[The following material is nonpublishable under Supreme Court Rule 23.]

Defendant next argues that the trial court abused its discretion in sentencing him to 14 years' imprisonment. A trial court has wide latitude in sentencing a defendant as long as it does not ignore relevant mitigating factors or consider improper aggravating factors. *People v. Sven*, 365 Ill. App. 3d 226, 241 (2006). The weight to be given to these factors depends on the circumstances of each case. *People v. Garibay*, 366 Ill. App. 3d 1103, 1109 (2006). A reviewing court will not substitute its judgment for that of the trial court even if it would have weighed the factors differently. *People v. Starnes*, 374 Ill. App. 3d 329, 337 (2007). The trial court is presumed to have properly considered all mitigating factors before it, and it is the defendant's burden to prove otherwise. *People v. Connery*, 296 Ill. App. 3d 384, 391 (1998). We will not disturb the trial court's determination of an appropriate sentence falling within the statutory range absent an abuse of discretion. *Starnes*, 374 Ill. App. 3d at 337. A sentence is an abuse of discretion where it varies greatly from the spirit and purpose of the law or it is manifestly disproportionate to the nature of the offense. *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

Appendix A

Defendant pleaded guilty to intent to manufacture a controlled substance, subjecting him to a sentencing range of 6 to 40 years' imprisonment (720 ILCS 570/401(a)(6.6)(B) (West 2000)). In arguing that the trial court abused its discretion in sentencing him to 14 years' imprisonment, defendant reasserts the arguments he presented at the sentencing hearing. Specifically, defendant argues that although he had reached a low point in his life with his drug use and his resulting behavior, after his arrest in this case he made remarkable strides toward recovery and turning his life around. Defendant notes that he continued to pursue his education, including working towards a Ph. D. at the University of Illinois. While there, he put in 60 to 70 hours per week in a lab, researching the aging process. Defendant notes that all of his character witnesses who had known him since spring 2003 testified to his good character and work ethic, and they testified that they had never seen him act violently or use illegal drugs. Defendant points out that he also expressed remorse and embarrassment over his actions. Defendant contends that his 14-year sentence is wholly out of line with his circumstances and the path he has taken to a better life.

We disagree with defendant's argument. While defendant's pursuit of a Ph. D. after his arrest is certainly commendable, defendant already had an undergraduate degree and a law degree from well-known institutions at the time he committed the instant crime. Thus, defendant already had the educational background to further himself but instead chose to

engage in illegal activity. More importantly, the trial court considered the positive change in defendant's behavior, work ethic, and attitude after his arrest and specifically stated that it was imposing a lesser sentence because of these mitigating factors. A trial court is not required to give greater weight to a defendant's rehabilitative potential than to the seriousness of the offense or other aggravating factors. *People v. Houston*, 363 Ill. App. 3d 567, 577 (2006). Here, defendant intended to set up a methamphetamine lab even after being previously arrested for such an offense, and he had prior drug-related convictions as well. Also in aggravation, defendant wanted to have someone armed with a gun at the apartment door to act as security, and he gave the undercover officer the go-ahead to kill potential witnesses. Defendant's sentence of 14 years falls in the lower 1/3 of the sentencing range. In light of both the aggravating and mitigating factors, we cannot say that the trial court abused its discretion in imposing this sentence.

Defendant attached to the appendix to his reply brief scientific articles that he had coauthored before and after sentencing, including during his imprisonment. Defendant argues that these articles further show that his continued research, work, and interest in his new field is genuine and not a sham towards ameliorating his potential sentence. The State filed a motion to strike the documents in the appendix, arguing that they were not properly before this court. See *In re O.R.*, 328 Ill. App. 3d 955, 961 (2002) (documents not included in the record on appeal are not properly before the appellate

court and cannot be used to supplement the record). Defendant filed a reply arguing that we can take judicial notice of publications. See *Wehde v. Regional Transportation Authority,* 237 Ill. App. 3d 664, 673 (1992). We ordered the motion taken with the case. In the criminal context, the appellate court will take judicial notice of scientific commentaries in determining the admissibility of scientific evidence (see *People v. Dalcollo,* 282 Ill. App. 3d 944, 955 (1996)), not as evidence to bolster other mitigating evidence presented to the trial court. However, even if, *arguendo,* we were to consider the articles, they would not affect our resolution of this case. The trial court recognized defendant's intelligence and, as discussed, it took into account the positive changes in defendant's life as a mitigating factor.

Defendant further argues that "[m]uch of the activity the undercover agent related concerning this charge arose largely out of braggadocio, not out of anything designed to actually create a methamphetamine lab in the apartment." Defendant maintains that this includes statements regarding providing security in the apartment, because no such security was ever created and no weapon was found relating to his apartment. Defendant argues that more significantly, the police targeted and "arguably entrapped" him by supplying him with most of the constituent chemicals to manufacture methamphetamine. Defendant points out that the police knew that he had escaped a previous charge due to unlawful police conduct. Defendant asserts that the police knew that he was predisposed towards committing an offense, and they acted to "cultivate" him

by basically using an informant to entrap him toward a conspiracy to commit the charged offense.

We have considered the circumstances leading to defendant's crime in our analysis of whether the trial court abused its discretion in its choice of a sentence. However, we give no weight to defendant's claims of an alleged entrapment, as he chose to plead guilty in this case rather than assert an entrapment defense. In response to defendant's argument that his discussions with the undercover officer were largely a result of boasting rather than "anything designed to actually create a methamphetamine lab," we must point out the obvious, that defendant pleaded guilty to intent to manufacture methamphetamine. Defendant has not sought to withdraw his guilty plea, so his intent to make methamphetamine is beyond question. As for the statement regarding security, Raysby testified that they ultimately agreed that Raysby, who claimed that he had access to guns, would act as security for the apartment. Therefore, it is understandable that the police did not find any guns in defendant's apartment.

Defendant additionally argues that his sentence is out-of-line with co-defendant Doucette's eight-year sentence. Defendant maintains that Doucette's culpability was more egregious because Doucette brought methamphetamine and materials to manufacture more of the drug from California to Illinois. Doucette was also supposed to take drugs manufactured in Illinois back to California for sale.

"Arbitrary and unreasonable disparity between the sentences of similarly situated codefendants is impermissible." *People v. Caballero*, 179 Ill. 2d 205, 216 (1997). A difference in sentences may be justified by the codefendants' relative character and history, their degree of culpability, their rehabilitative potential, or their criminal records. *People v. Martinez*, 372 Ill. App. 3d 750, 760 (2007). The controlling factor is not the disparity itself, but rather the reason for the disparity. *Martinez*, 372 Ill. App. 3d at 760.

We initially note that while defendant's criminal history was presented to the trial court, there is no evidence of Doucette's criminal history in the record. Defendant included in the appendix of his reply brief Doucette's purported California criminal record. It shows 1996 and 1997 convictions of receiving or concealing stolen property and of possession of a controlled substance. It also includes charges from 1996 and 1997 of burglary and possession of methamphetamine. These charges were dismissed or not prosecuted. The State's motion to strike requested that we also strike these documents. Defendant counters that we may take judicial notice of the material as public records. See *In re W.S.*, 81 Ill. 2d 252, 257 (1980) (courts may take judicial notice of public records in both civil and criminal cases). However, a court will not take judicial notice of critical evidentiary material that the party did not present to the trial court. *People v. Mehlberg*, 249 Ill. App. 3d 499, 531 (1993). This principle seems especially applicable in a case such as this one, where the trial court's underlying ruling is discretionary.

In any event, whether we considered Doucette's criminal record would not affect our agreement with the State's argument that defendant and Doucette are not similarly situated. First, Doucette cooperated with authorities and entered a fully negotiated guilty plea in exchange for eight years' imprisonment. In contrast, defendant entered only a partially negotiated guilty plea. Second, though the record shows that Doucette pleaded guilty to a class X offense, the precise offense he pleaded guilty to is not named in the record. Third and most importantly, the evidence shows that while Doucette was acting as a drug courier, defendant was the person who initiated and planned the venture. Defendant also sought to distance himself from the sale of drugs so as not to be caught, wanted someone armed with a gun to guard the apartment door, and told the undercover officer to kill potential witnesses if necessary. These combined factors make defendant more culpable than Doucette. Thus, defendant and Doucette were not similarly situated, and correspondingly, their sentences are not unreasonably disparate. *Cf. People v. Ramos*, 353 Ill. App. 3d 133, 140-41 (2004) (the defendant's 16-year sentence was not unfairly disparate to codefendant's seven-year sentence even though they participated equally in the offense, because (1) the defendant had a more extensive criminal history and (2) activities that might typically be considered indicative of rehabilitative potential actually showed the opposite, in that the defendant constantly eschewed those activities and turned to crime).

Last, defendant argues that the trial court improperly considered in aggravation factors inherent in the offense itself, including heavily relying on his statements to Raysby about how the apartment lab would be set up and operated. However, in sentencing a defendant, a trial court may consider the nature and circumstances of the offense, including the nature and extent of each element of the crime that the defendant committed. *People v. Saldivar*, 113 Ill. 2d 256, 268-69 (1986). Here, nothing in the trial court's comments indicates that it improperly considered factors inherent in the crime.

[The preceding material is nonpublishable under Supreme Court Rule 23.]

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Du Page County circuit court.

Affirmed.

HUTCHINSON and GROMETER, JJ., concur.

APPENDIX B — ORDER OF THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, STATE OF ILLINOIS, COUNTY OF DU PAGE FILED SEPTEMBER 14, 2006

STATE OF ILLINOIS
COUNTY OF DU PAGE
IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT

CASE NUMBER
01 CF 2075

PEOPLE OF THE STATE OF ILLINOIS

-vs-

STUART ROSE

DEFENDANT(S)

ORDER

This cause having come on to be heard upon the motion of the defendant and the Court being fully advised in the premises, having jurisdiction of the subject matter:

IT IS HEREBY ORDERED Motion to reconsider sentence is denied for reasons stated of record.

ENTER:

s/ [illegible]
JUDGE

Date: 9-14-06

APPENDIX C — ORDER OF THE SUPREME COURT OF ILLINOIS DENYING PETITION FOR LEAVE TO APPEAL DATED NOVEMBER 26, 2008

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

November 26, 2008

Mr. Robert G. Black
Law Offices of Robert G. Black
300 E. Fifth Avenue, Suite 365
Naperville, IL 60563

No. 107264 – People State of Illinois, respondent, v. Stuart W. Rose, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 31, 2008.